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April 20, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: August 12, 2004

Case No.: TIA-0163

XXXXXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits. The Applicant was a DOE contractor employee at a DOE facility. An independent physician panel (the Physician Panel or the Panel) found that the Applicant did not have an illness related to a toxic exposure at DOE. The OWA accepted the Panel's determination, and the Applicant filed an appeal with the DOE's Office of Hearings and Appeals (OHA). As explained below, we have concluded that the appeal should be denied.

I. Background

A. The Energy Employees Occupational Illness Compensation Program Act

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. As originally enacted, the Act provided for two programs. Subpart B provided for a Department of Labor (DOL) program providing federal compensation for certain illnesses. See 20 C.F.R. Part 30. Subpart D provided for a DOE assistance program for DOE contractor employees filing for state workers' compensation benefits. Under the DOE program, an independent physician panel assessed whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3); 10 C.F.R. Part 852 (the

Physician Panel Rule). The OWA was responsible for this program.¹

The Physician Panel Rule provided for an appeal process. An applicant could appeal a decision by the OWA not to submit an application to a Physician Panel, a negative determination by a Physician Panel that was accepted by the OWA, and a final decision by the OWA not to accept a Physician Panel determination in favor of an applicant. The instant appeal was filed pursuant to that Section. The Applicant sought review of a negative determination by a Physician Panel that was accepted by the OWA. 10 C.F.R. § 852.18(a)(2).

While the Applicant's appeal was pending, Congress repealed Subpart D. Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004). Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, all Subpart D claims will be considered as Subpart E claims. *Id.* §3681(g). In addition, under Subpart E, an applicant is deemed to have an illness related to a workplace toxic exposure at DOE if the applicant received a positive determination under Subpart B. *Id.* §3675(a).

During the transition period, in which DOL sets up the Subpart E program, OHA continues to process appeals of negative OWA determinations.

B. Procedural Background

The Applicant was employed in various capacities at the Oak Ridge Plant (the plant). He worked as a lab tech and scheduler from 1979 to 1995. From 1995 to 1996 he was employed as an illustrator in the Y-12 facility. He requested physician panel review of "blood clots," and "seizure/headache/stroke." The OWA forwarded the application to the Physician Panel.

The Physician Panel rendered a negative determination. The Panel described the blood clots as thrombophlebitis with a date of onset of 1994. The Panel described the seizure/headache/stroke as a cerebrovascular hemorrhage with accompanying headache and seizure. The Panel discussed some of

¹ www.eh.doe.gov/advocacy

the Applicant's exposures at the plant, but stated that the Applicant's illnesses were not known to be associated with occupational exposures to toxic substances.

The OWA accepted the Physician Panel's determinations on the illnesses. The Applicant filed the instant appeal.

In his appeal, the Applicant alleges factual errors in the Panel report. He contends that the Panel incorrectly identified the date of onset of his thrombophlebitis, the location of his cerebrovascular hemorrhage, and certain risk factors. Finally, the Applicant claims sensitivity to toxic substances not specifically mentioned in the Panel report.

II. Analysis

Under the Physician Panel Rule, independent physicians rendered an opinion whether a claimed illness was related to a toxic exposure during employment at DOE. The Rule required that the Panel address each claimed illness, make a finding whether that illness was related to a toxic exposure at DOE, and state the basis for that finding. 10 C.F.R. § 852.12. The Rule required that the Panel's determination be based on "whether it is at least as likely as not that exposure to a toxic substance" at DOE "was a significant factor in aggravating, contributing to or causing the illness." *Id.* § 852.8.

The Applicant has not alleged an error that is material to the Panel determination. The Panel stated that the Applicant's illnesses were not known to be associated with occupational exposure to toxic substances. Given that rationale, the Applicant's assertions of factual errors concerning the date of onset of his thrombophlebitis, the location of his cerebrovascular hemorrhage, his risk factors for those illnesses, and his sensitivity to certain substances, are not assertions of errors that are material to the determination. Accordingly, any further consideration of these assertions is not warranted.

In compliance with Subpart E, these claims will be transferred to the DOL for review. The DOL is in the process of developing procedures for evaluating and issuing decisions on these claims. OHA's review of these claims does not purport to dispose of or in any way prejudice the Department of Labor's review of the claims under Subpart E.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0163 be, and hereby is, denied.
- (2) This denial pertains only to the DOE claim and not to the DOL's review of this claim under Subpart E.
- (3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: April 20, 2005